Supreme Court, U. S.
FILED
AUG 14 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1978

No. 78-246

W. B. ARMSTRONG,

Appellant,

vs.

STATE OF NEW MEXICO,

Respondent.

On Appeal From
The Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

Leslie E. Nunn
Attorney for Appellant
314 North Auburn
Farmington, New Mexico 87401
Telephone: (505) 325-2826

TABLE OF CONTENTS

	Page
Opinion Below	4
Jurisdiction	4
Constitutional and Statutory Provisions Involved	6
Questions Presented	8
Statement	8
1. Events Prior to and During Trial	9
2. The Proceedings after Trial	10
How the Federal Questions were Raised and Decided Below	11
The Federal Questions are Substantial	14
I. Whether Sections 40A-2-1B and 40A-28-1 N.M.S.A. 1953, Comp, when considered together violate the Fifth, Sixth and/or Fourteenth Amendments?	14
II. Whether the trial counsel's conduct denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?	15
III. Whether Rules 201(a) and 202 of the N.M. Crim. App. and/or action of the Court of Appeals of the State of New Mexico as allowed to stand by the Supreme Court of the State of New Mexico denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?	16
IV. Whether the refusal of the Supreme Court of the State of New Mexico to grant Appellant's petition for writ of certiorari denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?	17

TABLE OF CASES

	Page
Beasley v. United States, (CA6 Mich) 491 F 2d 687	15
Gideon v. Wainwright, 372 U.S. 335, 9 L ed 2d 779, 83 SCt 792	15
Groves v. Slaughter, 15 Pet (US) 449, 10 L ed 800	17
King v. Mullins, 171 U.S. 404, 43 L ed 214, 18 S Ct 925	17
People v. Brown, 249 N.Y. Supp. 2d 922, 21 A.D. 2d 738 (1964)	14
People v. Falu, 325 N.Y. Supp. 2d 798, 27 A.D. 2d 1025 (1971)	14
People v. Hassin, 368 N.Y. Supp. 2d 253, 48 A.D. 2d 705 (1975)	14
People v. Weeks, 86 Ill App. 2d 480, 230 N.E. 2d 13 (1967)	14
People v. Zimmerman, 360 N.Y. Supp. 2d 47 A.D. 2d 725 (1974)	14
State v. Dahlstrom, 276 Minn 301, 150 N.W. 2d 53 (1967)	14
State v. Foster, 87 N.M. 155, 530 P2d 949 (1974)	14
State v. Tapia, 81 N.M. 724, 466 P.2d 551 (1971)	14
United States ex rel Mafelli v. Reincke (CA2 Conn) 383 F2d 129	15

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

N.M.S.A., 1953 Comp. Section 40A-2-1
N.M.S.A., 1953 Comp. Section 40A-28-1
N.M. Crim. App. 102
N.M. Crim. App. 201(a)
N.M. Crim. App. 202
28 U.S.C. Section 1257 (2)
28 U.S.C. Section 2103

Constitutional and Statutory Provisions Involved 6

Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute. 14

Conclusion 18

Appendix

Mandate from Court of Appeals (Final Decision) A2
Opinion of New Mexico Supreme Court A3
Opinion of New Mexico Court of Appeals A4
Notice of Appeal A6-A7
Affidavit of Appellant A8
Affidavit of Appellant's Step Daughter A10
Affidavit of W.E. Wreyford A12
Notice of Incapacity to Form Specific Intent A13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No.

W.B. ARMSTRONG

Appellant,

vs.

STATE OF NEW MEXICO,

Respondent.

On Appeal From The Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Supreme Court of the State of New Mexico is set forth in the Appendix, intra, p. A3 and the mandate of the Court of Appeals of the State of New Mexico is set forth in the Appendix, intra, p. A2.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2), this being an appeal which draws into question the validity of Sections 40A-2-1B and 40A-28-1, N.M.S.A. 1953 Comp., on the ground that taken together and as applied in the instant case they are repugnant to the Constitution of the United States.

Further, trial counsel's conduct denied Appellant his rights under the United States Constitution. Also, the procedural rules of the New Mexico Rules of

Appellate Procedure for Criminal Cases, in part, are repugnant to the Constitution of the United States. Lastly, the refusal of the Supreme Court of the State of New Mexico to grant Appellant's petition for writ of certiorari violated Appellant's rights granted to him in the Constitution of the United States.

On May 12, 1977, Appellant was charged with the crime of attempted murder. He was subsequently convicted of attempted second degree murder and sentenced to the state penitentiary for from two to ten years, with all but one year suspended.

Trial counsel during the trial ineffectually represented Appellant and failed to file the Notice of Appeal on time, being one day late. While thereafter, the various docketing statements, copies of records and so forth were filed in a timely manner, on April 11, 1978, the Court of Appeals of the State of New Mexico dismissed Appellant's appeal for lack of jurisdiction as the Notice of Appeal was filed one day late. Timely petition for writ of certiorari was filed by Appellant in the Supreme Court of the State of New Mexico, which petition was denied on May 18, 1978. The date stamp on the Opinion of the Supreme Court is dated May 16, 1978. The mandate of the Court of Appeals of the State of New Mexico stating that the decision was now final was dated and filed on May 19, 1978.

The decision on the case at the State level for the Court of Appeals and the Supreme Court became final on May 19, 1978. Appellant's Notice of Appeal to the Supreme Court of the United States was filed in the State Supreme Court and the State Court of Appeals on June 16, 1978. This matter is appropriately brought to this Court by appeal.

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be

regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. Section 2103.

Constitutional and Statutory Provisions Involved

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Also involved is Section 40A-2-1, N.M.S.A. 1953 Comp. which states:

"Murder. — Murder is the unlawful killing of one human being by another with malice aforethought, either express or implied, by any of the means with which death may be caused.

A. Murder in the first degree consists of all murder perpetrated:

(1) by any kind of willful, deliberate and premeditated killing;

(2) by means of poison, lying in wait or torture;

(3) in the commission of or attempt to commit any felony;

(4) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life; or

(5) from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being.

Whoever commits murder in the first degree is guilty of a capital felony.

B. Murder in the second degree consists of all other murder.

Whoever commits murder in the second degree is guilty of a second degree felony."

and Section 40A-28-1, N.M.S.A. 1953, Comp., which provides:

"Attempt to commit a felony. — Attempt to commit a felony consists of an overt act in futherance

of and with intent to commit a felony and tending but failing to effect its commission."

Also involved are Rules 102, 201(a) and 202 of the New Mexico Rules of Appellate Procedure for Criminal Cases, hereinafter cited as N.M. Crim. App., being as follows:

"Rule 102. For failure to comply with these rules or any order of Court, the appellate court may, on motion or on its own initiative, take such action as it deems appropriate, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of costs or, in extreme cases, dismissal or affirmance."

"Rule 201(a). Filing the Notice of Appeal. An appeal permitted by law as of right shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 202."

"Rule 202(a). Filing Notice. The notice of appeal shall be filed within 10 days after the filing of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before filing of the judment or order shall be treated as filed after such filing and on the day thereof.

"(b) Time Extended — Motion for New Trial Under Rule 45, Rules of Criminal Procedure. (1) If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the filing of an order denying the motion. (2) A motion for new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after filing of the judgment.

"(c) Time Extended — Excusable Neglect. Upon good cause shown the district court may, before and

after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by these Rules."

Questions Presented

I. Whether Sections 40A-2-1B and 40A-28-1 N.M.S.A. 1953, Comp, when considered together violate the Fifth, Sixth and/or Fourteenth Amendments?

II. Whether the trial counsel's conduct denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?

III. Whether Rules 201(a) and 202 of the N.M. Crim. App. and/or action of the Court of Appeals of the State of New Mexico as allowed to stand by the Supreme Court of the State of New Mexico denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?

IV. Whether the refusal of the Supreme Court of the State of New Mexico to grant Appellant's petition for writ of certiorari denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?

Statement

Appellant, W. B. Armstrong, was charged on May 12, 1977 with attempted murder in the first degree, the offense allegedly having occurred on December 29, 1976. He was convicted of attempted second degree murder. Notice of appeal was filed one day late. Appellant was permitted to go through the entire appeal process of docketing, preparing and forwarding the record, and so on. The Court of Appeals of the State of New Mexico on April 11, 1978 summarily dismissed Appellant's appeal as not having been filed timely. Appellant then petitioned the

Supreme Court of the State of New Mexico for a writ of certiorari. This was denied on May 18, 1978. The opinion of the State Supreme Court was stamped as filed on May 16, 1978, although the typed date read May 18, 1978. The mandate of the State Court of Appeals stating that the decision was now final was filed on May 19, 1978.

1. Events Prior to and During Trial

Prior to trial, Appellant's trial counsel gave proper notice of incapacity to form specific intent. The matter went to trial by jury commencing August 1, 1977, and was presented to the jury with verdict forms for attemped first degree murder, attempted second degree murder and not guilty. The jury was instructed that in the event they found Appellant not capable of forming a deliberate intention to take the life of another, they must find him not guilty of attempted first degree murder but could find him guilty of attempted second degree murder if the elements were met; the elements of attempted second degree murder being, (a) the Appellant intended to commit second degree murder, (b) the Appellant began to do an act which constituted a substantial part of the second degree murder but failed to commit second degree murder and (c) this happened in New Mexico on or about the 29th day of December, 1976. Further, the jury was instructed that to find the Appellant guilty of attempted second degree murder, they must find beyond a reasonable doubt that the Appellant attempted to kill the victim, that the Appellant had an intent to kill or do great bodily harm to the victim (emphasis supplied), and that this happened in New Mexico on or about the 29th of December, 1976.

During the course of the trial, the Appellant was represented by an attorney licensed to practice law in the State of New Mexico, but Appellant states that he

was not properly represented by that counsel at either the trial or the post-trial proceedings. Appellant states in an affidavit that he had a dispute with his attorney's paralegal over payment of his legal fee and that the paralegal did not assist his attorney during the trial as he understood would happen, that his counsel refused to challenge prospective jurors which Appellant expressed concern about, that the attorney did not call expert and other witnesses who were available including a psychiatrist who had evaluated Appellant and could testify as to Appellant's mental capacity at the time of the alleged offense, and that the attorney did not properly prepare or file the appeal with the State appellate courts in Appellant's behalf as he agreed to do. Further, during the course of the trial, Appellant's trial counsel instructed Appellant to be quiet and ignored his requests. (App. A8).

Without Appellant's knowledge until sometime after the trial, the attorney made a statement to Appellant's stepdaughter that "I will just have to 'get' him in court if he doesn't pay up." The attorney's paralegal, in speaking of the Appellant prior to trial, told the same stepdaughter "we will screw him in court." (App. A11).

2. The Proceedings after Trial

Subsequent to the trial, Appellant's counsel applied for and was given an extension of time in which to file his Notice of Appeal, but he did not file such notice in a timely fashion. When questioned by Appellant and Appellant's wife as to the filing of the appeal, the attorney indicated that the appeal would be filed on time. Appellant believed this impossible due to the time deadline and the geographic location of the attorney. When asked how this would be possible, the attorney stated "I don't give a damn if you get anything filed or not, if you want to know the

truth of it." (App. A12).

The original counsel in the case refused to proceed further in the appeal because of his fee dispute with the Appellant, but did not seek consent to withdraw from the cause as required by the N.M. Cri. App.

Appellant retained new counsel. The "old" counsel persisted in his failure to withdraw, and forced the new counsel to unilaterally enter his appearance on behalf of the Appellant. The original counsel refused to cooperate with the new attorney even to the point of refusing to furnish the Appellant's case file to the new attorney.

On April 11, 1978, the Court of Appeals summarily dismissed the appeal as it was not filed timely and stated that such failure to timely file the Notice of Appeal went to the jurisdiction of the Court. (App. A4). A petition for writ of certiorari was filed by the new counsel to the Supreme Court of the State of New Mexico, but such application was summarily denied by the Supreme Court of the State of New Mexico on May 18, 1978. (App. A3). On May 19, 1978, the Court of Appeals of the State of New Mexico remanded the matter to the District Court by mandate as then being a final decision. (App. A2).

How the Federal Questions Were Raised and Decided Below

I. Whether Sections 40A-2-1B and 40A-28-1, N.M.S.A., 1953, Comp, when considered together violate the Fifth, Sixtth and/or Fourteenth Amendments?

Appellant in his brief to the New Mexico Court of Appeals argued that Section 40A-2-1 defined murder as the unlawful killing of one human being by another. An attempted murder (Section 40A-28-1),

whether in the first or second degree would require, by definition, a specific intent to kill another human being. As applied in the trial court, however, the jury was permitted to find the Appellant guilty of attempted second degree murder by finding that the Appellant intended to do great bodily harm to the victim, and was not required to find that the Appellant had the intent to kill the victim. The Appellant's new counsel went into great lengths in his brief interpreting the statute, citing cases, and other matters relating to the specific intent to kill, as being required for a finding of guilty of attempted second degree murder. This included discussion of the Appellant's alleged intoxication at the time of the incident.

This was not ruled upon in any way by the State Court of Appeals, as it dismissed the appeal for not having been timely filed. As Appellant's petition for writ of certiorari was summarily denied by the Supreme Court for the State of New Mexico, that Court also did not consider the import of the matters raised by Appellant in his appeal.

II. Whether the trial counsel's conduct denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?

The conduct of Appellant's trial counsel was not raised at all by Appellant in the trial court, as Appellant believed he could not question during the course of the trial his counsel's conduct. (App. A9). It was however, raised in Appellant's petition for writ of certiorari, wherein the new counsel argued:

> "The Defendant cannot argue with the fact that the Notice of Appeal was filed late. However, Defendant can and does argue that to deprive him of what may have been a meritorious appeal due to such a failure by his original counsel, over which the Defendant himself had

> no control, is a miscarriage of justice and should not be allowed to stand. This is especially true in the particular circumstances of this case in which the Defendant was forced to hire other counsel after the appeal process had already been begun, due to the refusal of his original attorney to proceed with the appeal until his fee had been paid. Such refusal, in effect, left the Defendant adrift in the middle of the appellate process without the benefit of legal representation and, in truth, handling his own criminal appeal."

As the State Supreme Court refused to grant Appellant's petition for writ of certiorari the matter was not addressed by the State Supreme Court.

III. Whether Rules 201(a) and 202 of the N.M. Crim. App. and/or action of the Court of Appeals of the State of New Mexico as allowed to stand by the Supreme Court of the State of New Mexico denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?

The constitutionality of Rules 201 and 202 of the State Appellate Rules, was not addressed by either the Court of Appeals or by the State Supreme Court for the reasons referred to above pertaining to the manner in which these courts decided Appellant's cause. In his petition before the State Supreme Court, Appellant argued that the manner in which his case had been handled by the Court of Appeals deprived him of his constitutional due process rights.

IV. Whether the refusal of the Supreme Court of the State of New Mexico to grant Appellant's petition for writ of certiorari denied Appellant his Fifth, Sixth and/or Fourteenth Amendment rights?

This issued has not been raised by this Appellant at any level until now.

The Federal Questions Are Substantial

I

As now allowed to stand by the Supreme Court of the State of New Mexico, a Defendant can be convicted of attempting to murder in the second degree where second degree murder does not require any specific intent, and the "attempt" itself does not require specific intent. In other words, a Defendant may be convicted of attempted murder solely with a mental state of intent to do great bodily harm to his victim only. New Mexico has held that attempts are specific intent crimes, *State v. Foster*, 87 N.M. 155, 530 P2d 949 (1974). On the other hand, as stated, second degree murder does not require specific intent. *State v. Tapia*, 81 N.M. 274, 466 P. 2d 551 (1971). See also, the *Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, Welchsler, Jones, and Corn, 61 Columbia Law Review 571. For other cases illustrating the same defect in logic exhibited by a charge of attempted second degree murder see *State v. Dahlstrom*, 276 Minn 301, 150 N.W. 2d 53 (1967); *People v. Weeks*, 86 Ill. App. 2d 480, 230 N.E. 2d 12 (1967); *People v. Zimmerman*, 360 N.Y. Supp. 2d 127, 47 A.D. 2d 725 (1974); *People v. Hassin*, 368 N.Y. Supp. 2d 253, 48 A.D. 2d 705 (1975); *People v. Brown*, 249 N.Y. Supp. 2d 922, 21 A.D. 2d 738 (1964); and *People v. Falu*, 325 N.Y. Supp. 2d 798, 27 A.D. 2d 1025 (1971).

To permit the Appellant to be convicted on such a charge as attempted second degree murder, allows him to be convicted of what amounts to an "impossible" crime. The conviction of such a crime certainly flies in the face of the United States Constitution. As it can now happen again in the State of New Mexico as well as possibly occur in any of the

several states, it is of substantial importance affecting all persons who are subject to the laws of the land.

II

The right to counsel is one of the most basic and fundamental rights given to an accused Defendant. *Gideon v. Wainwright*, 372U.S. 335, 9L E 2d 799, 83 S Ct 792. The standard to be applied concerning assistance of counsel, is that the Defendant is entitled to counsel who is reasonably likely to render and does render reasonably effective assistance. The counsel must conscientiously protect his client's interest, without being hampered by conflicting consideration and must assert all apparently substantial defenses available in a proper and timely manner. *Beasley v. the United States*, (CA6 Mich) 491 F2d 687. Further, failure to appeal where an appeal would probably have been successful is denial of proper assistance of counsel. *United States ex rel Mafelli v. Reincke*, (CA 2 Conn) 383 F2d 129. Certainly ones own counsel and his assistant making statements to the effect that the Appellant would be "gotten" in Court if he did not pay his bill and that he did not care if Appellant's appeal was filed in a timely manner, demonstrates a failure to meet the minimum requirements of the Sixth Amendment pertaining to assistance of counsel, without more.

In addition, trial counsel in this case failed to properly represent his client, the Appellant, in the trial of the cause by refusing to answer Appellant's questions, refusing to call expert and other witnesses who were available and could testify favorably to the Appellant and specifically with regard to impaired mental capabilities due to intoxication, and permitting a dispute over payment of a fee to adversely affect his handling of the case, all to the detriment of the Appellant.

The conduct, or lack thereof, on the part of Appellant's trial counsel goes to the heart of the assistance of counsel guaranteed to all individuals under the Constitution of the United States.

III

Rules 201A and 202 of the New Mexico Rules for Appellate Procedure for Criminal Cases, if the holding of the Court of Appeals is correct as it is allowed to stand by the State Supreme Court, do not permit the Court of Appeals to control it's own cases, as time in which appeals can be filed is extendable only by the district, or lower, Court. Such a holding would enable a lower court judge to "cover" his own errors by refusing to grant an extension of time to a hapless Defendant, thereby precluding the Appeals Court from reviewing the case and correcting possible errors committed by the lower judge. In this manner, all aggrieved parties from a lower court would be substantially affected by the holding of the State Appellate Courts in this instant matter, as their appellate rights would be so adversely affected, contrary to the intent of the due process and other provisions of the United States Constitution.

Further, under Rule 102, failure to comply with Rules 201 and 202 can give rise to the appellate court "in extreme cases" dismissing the appeal. Neither the opinion of the State Court of Appeals or Supreme Court addresses the matter of the instant case being an "extreme case" thereby warranting dismissal. If there was such a finding inherently within their opinions, that finding was an abuse of discretion and not supported by the evidence in the case.

While generally the several states are left to their own rules and procedures in the administration of justice, certain basic minimum standards are provided

by the United States Constitution and otherwise must be met. Among those standards should be the procedures for taking appeal of state criminal trials, where those procedures involve matters such as due process, which are reckoned with in the United States Constitution. This certainly constitutes a substantial federal question.

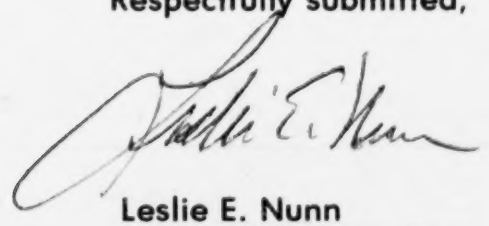
IV

The refusal of the Supreme Court of the State of New Mexico to grant Appellant's petition has permitted to stand the injustices and ignoring of Constitutional rights complained of above. The highest Court in every state should have the responsibility of insuring that the Constitution of the United States is properly applied and those rights guaranteed by it and applicable to the states are strictly enforced and protected in that state. *King v. Mullins*, 171 U.S. 404, 43 L ed 214, 18 S Ct 925. To permit otherwise, enables citizens of one state to be properly afforded the Constitutional guarantees, while allowing citizens of another state to be without such protection. *Grove v. Slaughter*, 15 Pet (US) 449, 10 L ed 800. Those portions of the Constitution applicable to the states, as interpreted by this Court, must be guarded and protected in every state at all cost.

Conclusion

For the foregoing reasons, probable jurisdiction should be noted.

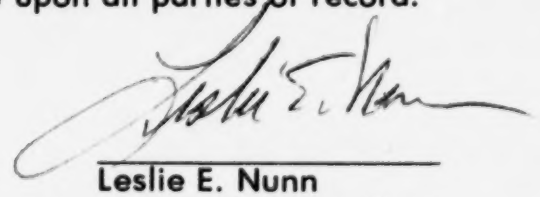
Respectfully submitted,



Leslie E. Nunn
Attorney for Appellant
314 North Auburn
Farmington, New Mexico 87401
Telephone: 505 325-2826

Certificate of Service

As shown by the separately filed Certificate of Service, which lists the persons served with copies of this Jurisdictional Statement and its Appendix, service has been made upon all parties of record.



Leslie E. Nunn
Counsel for Appellant

APPENDIX

Table of Contents

Page

Mandate from the
Court of Appeals - final decision A2
Opinion of the New Mexico Supreme Court..... A3
Opinion of the New Mexico Court of Appeals... A4
Notice of Appeal..... A6-A7
Affidavit of Appellant..... A8
Affidavit of Appellant's Stepdaughter..... A10
Affidavit of J.E. Wreyford A12
Notice of Incapacity to Form Specific Intent.... A13

RECEIVED MAY 22 1978

Dismissed

In the Court of Appeals of the State of New Mexico

NO. 3306

W.B. ARMSTRONG, Appellant **San Juan County**

v.

STATE OF NEW MEXICO, Appellee **No. 77-98 CR**

MANDATE

(Applicable items are indicated by an "X" below.)

1. _X_ Attached is a true and correct copy of the original decision entered in the above-entitled cause.
2. _X_ This decision being now final, the cause is remanded to district court for any further proceedings consistent with said decision.
3. _____ Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceedings consistant with said Supreme Court decision attached hereto.
4. _____ You are directed to issue any commitment necessary for the execution of your judgment and sentence.
5. _____ Cost Bill is assessed as follow:

COURT OF APPEALS OF NEW MEXICO
FILED
MAY 19 1978
HAZEL M. DAVIS, CLERK

6. _X_ District Court Clerk's Record returned herewith.
7. _____ Exhibits filed herein shall be picked up at the Clerk's Office forthwith.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 19th day of May, 1978.

(SEAL)

cc: Counsel
DA
NMSP

HAZEL M. DAVIS
Clerk of the Court of Appeals of the State of New Mexico.

RECEIVED MAY 16 1978

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Thursday, May 18, 1978

NO. 11,966

W.B. ARMSTRONG,
Petitioner,

vs. Original proceeding on Certiorari

STATE OF NEW MEXICO,
Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 3306 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY
ROSE MARIE ALDERETTE
Clerk of the Supreme Court
of the State of New Mexico

COURT OF APPEALS OF NEW MEXICO
FILED
APR 11 1978
Hazel M. Davis, Clerk

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
W.B. ARMSTRONG,
Defendant-Appellant

DISTRICT COURT
SAN JUAN COUNTY, N.M.
FILED: APR 12, 1978
Emma Jean Hottell, Clerk
No. 3306

APPEAL FROM THE DISTRICT COURT
OF SAN JUAN COUNTY

BROWN, Judge
TONEY ANAYA, Attorney General
PAQUIN M. TERRAZAS, Assistant Attorney General
Santa Fe, New Mexico Attorneys for Appellee

LARRY T. THROWER
GALLAGHER & THROWER
Farmington, New Mexico Attorneys for Appellant

MEMORANDUM

We do not reach the merits of defendant's appeal. Judgment and sentence was entered September 28, 1977. Defendant moved for an extension of time for filing a notice of appeal "so that his Rule 57 motion may be heard prior to Notice of Appeal." The post-conviction proceeding did not affect his right to a direct appeal. State v. Reyes, 79 N.M. 632, 447 P.2d

512 (1968). The trial court extended the time for filing notice of appeal "until the 24th day of October, 1977." Defendant's brief states that notice of appeal was filed October 27, 1977. That is incorrect. The notice of appeal was filed October 25, 1977. This notice was beyond the extension granted by the trial court and was untimely.

Timely taking of an appeal is jurisdictional. State v. Garlick, 80 N.M. 352, 456 P.2d 185 (1969); Gonzales v. City of Albuquerque, 90 N.M. 785, 568 P.2d 621 (Ct.App. 1977); State v. Martinez, 84 N.M. 766, 508 P.2d 36 (Ct.App. 1973).

The appeal is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

s/_____
Chief Judge

WE CONCUR:
s/B.C. Hernandez, J.
s/,J.

SUPREME COURT OF NEW MEXICO
FILED
JUNE 16, 1978
Rose Marie Alderette, Clerk

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

W. B. ARMSTRONG,
Appeallant,
vs. **No 11,966**

STATE OF NEW MEXICO
Appellee.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that W. B. Armstrong, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of New Mexico denying the appellant's petition for writ of certiorari, entered on May 16, 1978.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

NUNN and DUNLAP
By Leslie E. Nunn
Attorneys for Appellant
205 West Arrington
Farmington, New Mexico 87401
Telephone: 327-6232

I certify that I have mailed a copy of this to opposing counsel on June 16, 1978, by placing a copy of same in the U.S. mails postage prepaid. Leslie E. Nunn

COURT OF APPEALS OF NEW MEXICO
FILED
JUNE 16, 1978
Hazel M. Davis, Clerk

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

W.B. ARMSTRONG,
Appeallant,
vs. **No. 11,966**
STATE OF NEW MEXICO,
Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that W.B. Armstrong, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of New Mexico denying the appellant's petition for writ of certiorari, entered on May 16, 1978.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

NUNN and DUNLAP
By Leslie E. Nunn
Attorneys for Appellant
205 West Arrington
Farmington, New Mexico 87401
Telephone: 327-6232

I certify that I have mailed a copy of this to opposing counsel on June 16, 1978, by placing a copy of same in the U.S. mails postage prepaid. Leslie E. Nunn

Excerpts from
Affidavit of W.B. Armstrong

"I am W.B. Armstrong, defendant in the Criminal Action No. 77-98 brought by the State of New Mexico against me in the District Court in the County of San Juan.

"As my stepdaughter had just begun working for Mr. Binford, I retained Mr. Binford as my attorney. He and I met the first time where we discussed the fee that would be charged and what he would do to represent me. He indicated that the fee would be $3,000.00 for his attorney fees plus $1,000.00 for expenses. I assured him he would be paid, and arranged a payment schedule which would have him paid in full by the end of the trial.

"Mr. Binford told me pointedly and assured me that there was no way I could be convicted of the charge of attempted second degree murder, and that defending me on this case would be 'a piece of cake.'

"Mr. Binford hired an investigator who set about investigating the case. I met with Mr. Binford approximately three times, including the time I retained him, prior to the trial. I spoke with his paralegal on the telephone who argued with me about the payment of money.

"When we were seated at the Defendant's table in the court room, Mr. Binford arranged it so he sat on one end and next to him sat the investigator and I was placed on the other side of the investigator. In this fashion there was no way I could speak directly to Mr. Binford. All of my comments had to go through the investigator.

"When the jury was selected, I was concerned about a prospective juror, Mr. Cecil Flanery. I told the investigator and Mr. Binford that Mr. Flanery would not favor me and should not sit on the jury. Nevertheless, Mr. Binford refused to challenge Mr.

Flanery, but permitted him to stay on the jury.

"At this point I began having doubts as to whether Mr. Binford was properly representing me. I believed that I was stuck with Mr. Binford as the trial had begun. I did not realize that a trial could have been rescheduled if I had fired Mr. Binford. Not being a lawyer and not having been explained very much about the procedure of the trial I assumed that there was no way I could get another lawyer. When the trial began, during the first day, Mr. Binford did appear to work in my behalf. However, there were times when witnesses for the State would tell lies or be mistaken about things . . . But, nothing was done to bring out these lies against me.

"On the night before the last day of the trial Mr. Binford called me on the telephone and asked what I thought about flying the psychiatrist in for the trial. I told him if he was needed we should call him. I felt he was needed. Mr. Binford said, "Oh, I think I can win without him," so the psychiatrist was not called. At no time during the trial did the paralegal, Dorothy Consar, appear. She was to have been there, because this was the arrangement I had made when I hired Mr. Binford, that she would be there. . . . Available witnesses were not called to show that I had done all that I reasonably could to avoid a fight with the man who was injured. Witnesses were available, and I told Mr. Binford they were available, who could have called in my behalf to show that witnesses for the State were lying on crucial matters in the case. None of these witnesses were called in my behalf. My wife was not called in my behalf. In fact, I was led to believe she could not legally testify as she was my wife.

"When the assailant approached me the number of times he did prior to the actual fight, I was afraid.

. . . I was very afraid of him. But, I do not believe my fear was brought out in the trial as it should have been. Again the witnesses who could show this who were there that night were not called by my lawyer even though he knew of them. Witnesses who could show what I did to try to avoid the fight were not called in my behalf even though my lawyer knew of them.

After I was convicted and the trial was over, the Judge granted a time extension for filing the notice of appeal 'Until the 24th day of October, 1977.' On the morning of October 24, my wife and I contacted Mr. Binford and asked him where the appeal was. After some discussion and phone calls between Mr. Binford and us, Mr. Binford said in very strong language that he did not care if my notice of appeal was filed on time or not. At that point it was too late and the notice of appeal was not filed on time.

"It is my most sincere, earnest, and honest plea that my conviction will be reversed and if it is not possible for a complete reversal I request that I may have a new trial so that I will hire a proper attorney to represent me in this matter."

Excerpts from
Affidavit of Deborah Kay Cain

"My stepfather is W. D. Armstrong. I know Mr. Ralph C. Binford, the lawyer who defended my stepfather in the criminal charge of which he was convicted.

"I worked as a secretary for Mr. Binford from approximately February 16, 1977, through early June, 1977. During that period of time, I told Mr. Binford about my stepfather and the charge against him. Mr. Binford told me to have my stepfather contact him as he would represent him.

"In my presence, Mr. Binford and my stepfather had a discussion about the rest of the legal fee. My stepfather told Mr. Binford that he was trying to sell a house and would pay him the rest of the money as soon as the house was sold. Mr. Binford said that this was fine with him. When Ms. Consar later learned about this agreement, she was very upset and wanted my stepfather to pay all the rest immediately and not wait until the house was sold.

"Ms. Consar called my stepfather on the telephone about his paying all the rest of the money right then. I was in Ms. Consar's office when this telephone conversation took place. After talking, Ms. Consar slammed the telephone receiver down and said to me, 'Your damn stepfather. He won't give us the money until he walks out of the courtroom.'

"I told her that I had overheard a conversation where Mr. Binford and my stepfather had worked out an agreement about payment of the rest of the fee after the house was sold. Ms. Consar said, 'I run the books here.' Then, speaking about my stepfather, she said 'We will screw him in court.'

"I did not tell my stepfather this until after the trial when the problem came up on the appeal getting in on time.

"One time, while talking about my stepfather, Mr. Binford told me 'I will just have to get him in court if he doesn't pay up,' meaning to **get** him in trouble.

"Ms. Consar told me that she would not go to court with Mr. Binford in my stepfather's case. I told her that Mr. Binford could not function in court without her, and Ms. Consar said 'I know it.'

"I did not tell my stepfather these matters until after the appeal problem arose when Mr. Binford did not file the appeal on time."

Excerpts from
Affidavit of J.E. Wreyford

"I am J.E. Wreyford. I operate a business in Aztec, New Mexico and did employ Mrs. W.B. Armstrong in that business. Mrs. Armstrong's husband is the same W.B. Armstrong who was convicted recently of attempted second degree murder.

"On the 24th of October, 1977, to the best of my recollection on the date, I listened in on a telephone conversation between Ralph C. Binford, Mr. Armstrong's attorney in Albuquerque, New Mexico, and the Armstrongs.

"The telephone call was placed by Mrs. Armstrong, but Mr. Armstrong also spoke with Mr. Binford, as I recall. Mr. Binford was told that the time was running out in which to file an appeal of Mr. Armstrong's conviction. Mr. Binford agreed that he knew that. He said that he would file the appeal and that a messenger service would file it for him.

"When Mr. Binford was asked if the appeal would be filed on time, he said that it would not make any difference if it were filed a day or two late.

"When pressed as to the timeliness of the filing of the appeal, Mr. Binford said "I don't give a damn if you get anything filed or not, if you want to know the truth of it."

"Mr. Binford also stated that as soon as the appeal was filed he would be withdrawing as Mr. Armstrong's lawyer."

DISTRICT COURT
SAN JUAN COUNTY, N.M.
FILED: JUN 8 1977
COUNTY OF SAN JUAN
Emma Jean Hottell, Clerk

STATE OF NEW MEXICO COUNTY OF SAN JUAN
IN THE DISTRICT COURT

STATE OF NEW MEXICO,
Plaintiff,
vs.
W. B. ARMSTRONG,
Defendant.

NO CR 77-98

NOTICE OF INCAPACITY TO FORM SPECIFIC INTENT

The Defendant, by and through his attorney, Ralph C. Binford, and pursuant to Rule 35(e) of the Rules of Criminal Procedure, states that he intends to call the following expert witnesses to testify regarding the Defendant's inability to form the specific intent required as an element of the crime charged.

The name and address of the expert witness is:

Dr. Michael D. Muldawer
San Gabriel Medical Plaza — Suite 9A
3900 Eubank Blvd., N.E.
Albuquerque, New Mexico 87111

Respectfully submitted,
RALPH C. BINFORD
3939-C San Pedro, N.E., Suite 8
Albuquerque, New Mexico 87110
(505) 883-4666
s/Ralph C. Binford

I hereby certify that a copy of the above and foregoing has been furnished to adverse counsel this 7th day of June, 1977. s/Ralph C. Binford